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Poh Gaik Lye v Amfraser Securities Pte Ltd

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COURT OF APPEAL (PUTRAJAYA) — B-03(IM)-127–08 OF 2012
RAMLY ALI, MOHTARUDIN BAKI AND DAVID WONG JJCA
4 OCTOBER 2013

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Bankruptcy — Bankruptcy notice — Setting aside — Whether bankruptcy notice was defective — Whether amendment had remedied defect — Service — Whether application for substituted service of BN was flawed — Whether there was service of BN — Whether BN had conformed to terms of sealed order of judgment — Whether BN could be used to premise respondent's bankruptcy action against appellant

D

Civil Procedure — Mode of application — Ex parte application — Whether application to amend BN and substituted service of same could be treated as uncontested application in present case — Whether principles of natural justice applied

E

The respondent had obtained summary judgment in the sum of RM11,482,024.19 against the appellant. The respondent used the judgment to commence bankruptcy proceedings against the appellant. A bankruptcy notice ('the BN') for the sum of RM21,284,527.17, being the judgment sum plus interest, was duly issued. Unable to effect service of the BN on the appellant, the respondent filed an ex parte application for an extension of the BN and for the substituted service of the same on the appellant. The court granted the order for extension and substituted service of the BN. The appellant filed an application to set aside the order granting the extension of the BN and for the substituted service of the same on the appellant on the grounds that the BN was defective. It was an undisputed fact that the BN had contained the name 'Citibank Bhd' as the applicant rather than the respondent's name. The senior assistant registrar ('the SAR') hearing the appellant's application allowed the setting aside of the order. The respondent then applied for and obtained an order to amend the BN. The respondent also appealed against the decision of the SAR. The High Court judge hearing the appeal found that the order for the substituted service of the BN was not defective in view of the amendment of the BN. The High Court judge also found that the sum and interest claimed against the appellant in the BN was correct. As such, the High Court overturned the SAR's decision and restored the BN. This was the appellant's appeal against the decision of the High Court. The appellant argued that the order for the extension of the BN suffered a fatal defect in that it showed that the claim against him was from 'Citibank Bhd' and not the respondent. The appellant also submitted that the application to amend the

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extended BN and for substituted service of the amended BN had not remedied the defect. A

Held, allowing the appeal with costs of RM5,000:

(1) When the order for the extension of the BN was made it could not be a valid extension because at that time the BN contained the name Citibank Bhd as the applicant, when Citibank Bhd had no locus to make that application. Further, when that BN was served by publication by virtue of the substituted service order, it could not be any service of a BN on the appellant as it suffered from a fatal defect. In short, there was no service of the BN (see para 13). B C

(2) The order to amend the BN could not revive something which never had life in the first place. Further, at the time when the SAR allowed the appellant's application to set aside the BN and order granting substituted service of the BN, there was a fatal defect in the BN. Hence the SAR was correct to set aside the BN (see para 14). D

(3) The respondent had used an ex parte application for the amendment of the BN and substituted service of the same after the appellant had filed an application to set aside the BN. There was no reason for the application to amend the BN to be treated as an uncontested application. The principle of natural justice should be applied with full force in the present circumstances. Hence, the BN was defective and could not be used to premise the respondent's bankruptcy action against the appellant (see paras 15–16). E F

(4) The respondent's ex parte application for substituted service of the BN was flawed, in that it contained inconsistent reasons as to why service could not be effected on the appellant. In ex parte applications, the applicants should make full, frank and accurate disclosure to the court and could not rely on inconsistent grounds. Further, bankruptcy proceedings have great and damaging ramifications to one's livelihood. As such, a strict approach should be the order of the day (see paras 17–19). G H

(5) The primary document to premise a BN is the judgment. However, the sealed order of the judgment in the present case merely stated '13% interest' and not '13% interest per annum or month' as was done in all orders. Thus on the face of the order it would be difficult to conclude on what basis interest was charged, ie whether interest was charged at 13% per month or per annum. Thus, the BN had not conformed to the terms of the sealed order of the judgment (see para 20). I

[Bahasa Malaysia summary

Responden telah memperoleh penghakiman terus berjumlah RM11,482,024.19 terhadap perayu. Responden menggunakan penghakiman ini untuk memulakan prosiding kebankrapan terhadap perayu. Notis kebankrapan ('NB') berjumlah RM21,284,527.17, yang merupakan jumlah penghakiman beserta faedah, yang telahpun dikeluarkan. Oleh kerana tidak dapat menyampaikan NB tersebut kepada perayu, responden telah memfailkan permohonan ex parte untuk lanjutan NB tersebut dan untuk penyampaian gantian untuk yang sama ke atas perayu. Mahkamah memberikan perintah untuk lanjutan itu dan menggantikan penyampaian NB tersebut. Perayu telah memfailkan permohonan untuk mengetepikan perintah memberikan lanjutan NB tersebut dan untuk penyampaian gentian yang sama ke atas perayu atas alasan bahawa NB tersebut adalah defektif. Ia adalah fakta yang tidak dipertikaikan bahawa NB tersebut mengandungi nama 'Citibank Bhd' sebagai pemohon dan bukan nama responden. Penolong kanan pendaftar ('PKP') yang mendengar permohonan perayu membenarkan penepian perintah itu. Responden kemudian telah memohon untuk dan memperoleh perintah untuk meminda NB tersebut. Responden juga telah merayu terhadap keputusan PKP itu. Hakim Mahkamah Tinggi yang mendengar rayuan itu mendapati bahawa perintah untuk penyampaian gantian NB tersebut tidak defektif berdasarkan pindaan NB tersebut. Hakim Mahkamah Tinggi juga mendapati bahawa jumlah dan faedah yang dituntut terhadap perayu dalam NB tersebut adalah betul. Oleh itu, Mahkamah telah membatalkan keputusan PKP dan memulihkan NB tersebut. Ini adalah rayuan perayu terhadap keputusan Mahkamah Tinggi. Perayu berhujah bahawa perintah untuk lanjutan NB tersebut mengalami kecacatan yang memudaratkan di mana ia menunjukkan bahawa tuntutan terhadapnya adalah daripada 'Citibank Bhd' dan bukan responden. Perayu juga telah berhujah bahawa permohonan untuk meminda NB yang dilanjutkan itu dan untuk menggantikan penyampaian bagi NB yang dipinda tidak meremedikan kecacatan itu.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM5,000:

(1) Apabila perintah untuk lanjutan NB tersebut telah dibuat ia tidak boleh menjadi lanjutan yang sah kerana pada masa NB tersebut mengandungi nama Citibank Bhd sebagai pemohon, walhal Citibank Bhd tidak mempunyai locus untuk membuat permohonan tersebut. Selanjutnya, apabila NB tersebut disampaikan melalui penerbitan menurut perintah penyampaian gantian, ia tidak mungkin penyampaian NB ke atas perayu kerana ia mengalami kecacatan yang memudaratkan. Pendek kata, tidak terdapat penyampaian untuk NB tersebut (lihat perenggan 13).

(2) Perintah untuk meminda NB tersebut tidak memulihkan sesuatu yang tidak pernah wujud sebelum itu. Bahkan, pada masa PKP membenarkan permohonan perayu diketepikan NB tersebut dan perintah yang

memberikan penyampaian gantian ke atas NB tersebut, terdapat kecacatan yang memudaratkan dalam NB tersebut, justeru itu adalah wajar untuk PKP itu mengetepikan NB tersebut (lihat perenggan 14).

(3) Responden telah menggunakan permohonan ex parte untuk pindaan NB dan penyampaian gantian yang sama selepas perayu memfailkan permohonan untuk mengetepikan NB tersebut. Tiada sebab untuk permohonan meminda NB dianggap sebagai permohonan yang tidak dicabar. Prinsip keadilan asasi hendaklah terpakai sepenuhnya dalam keadaan ini. Justeru, NB tersebut adalah defektif dan tidak boleh digunakan untuk menjadi asas tindakan kebankrapan responden terhadap perayu (lihat perenggan 15–16).

(4) Permohonan ex parte responden untuk penyampaian gantian NB adalah cacat, di mana ia mengandungi sebab-sebab tidak konsisten berhubung kenapa penyampaian tersebut tidak dapat dilaksanakan ke atas perayu. Dalam permohonan ex parte, pemohon-pemohon hendaklah membuat pendedahan sepenuhnya, terang dan tepat kepada mahkamah dan tidak boleh bergantung kepada alasan-alasan yang tidak konsisten. Selanjutnya, prosiding kebankrapan banyak menjejaskan kehidupan seseorang. Oleh itu, pendekatan yang tegas adalah suatu yang wajar (lihat perenggan 17–19).

(5) Dokumen utama untuk menjadi asas NB adalah penghakiman. Walau bagaimanapun, perintah yang dimeteraikan dalam kes ini hanya menyatakan '13% interest' dan bukan '13% interest per annum or month' sebagaimana dilakukan dalam semua perintah. Oleh itu berdasarkan perintah tersebut adalah sukar untuk membuat kesimpulan atas asas apa faedah dikenakan, iaitu sama ada faedah dikenakan pada kadar 13% sebulan atau setahun. Oleh demikian, NB itu tidak membentuk terma-terma perintah yang dimeteraikan berhubung penghakiman tersebut (lihat perenggan 20).]

Notes

For cases on setting aside of bankruptcy notice, see 1(2) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 3066–3067.

Cases referred to

Aris Massod; Ex P UoL Factoring Sdn Bhd, Re [1999] 3 MLJ 358; [1998] 4 CLJ Supp 446, HC (refd)

Legislation referred to

Bankruptcy Act 1967 s 3(2)(ii)

Appeal from: Civil Appeal No S29–7063 of 2008 (High Court, Shah Alam)

Ho Kok Yew (Ranjit Singh & Co) for the appellant.
Sathya Kumaroas (Shearn Delamore & Co) for the respondent.

David Wong JCA (delivering judgment of the court):

INTRODUCTION

[1] This matter emanates from the decision of the learned senior assistant registrar who had on 15 June 2011 allowed an application by the appellant here to set aside a bankruptcy notice issued by the respondent.

[2] That led to an appeal by the respondent to the High Court where the learned judge on 25 July 2012 allowed the appeal and restored the bankruptcy notice. This appeal is the result of decision of the learned judge.

[3] We heard the appeal and after due consideration to respective submissions we allowed the appeal and now give our reasons.

BACKGROUND FACTS

[4] The respondent had on 10 July 1998 obtained a summary judgment in the sum of RM11,482,024.19 against the appellant. A bankruptcy notice was issued on 18 December 2008 premised on the summary judgment. The amount claimed in the bankruptcy notice was for the sum of RM21,284,527.12, being the judgment sum together with interest calculated up to six years from the date of judgment dated 9 July 2004.

[5] On 21 April 2009, the respondent in an ex parte application obtained an order to extend the validity of the bankruptcy notice from 18 March 2009–17 March 2010 and also an order of substituted service of the same.

[6] The appellant on 16 December 2009 made an application before the learned senior assistant registrar to set aside the extension of the bankruptcy notice and substituted service of the same. As stated earlier the learned senior assistant registrar on 15 June 2011 allowed the application but that decision was overturned by the High Court on 25 July 2012.

[7] The appellant had on 8 February 2010 applied to amend the extension and the substituted service order as the bankruptcy notice had contained the name 'Citibank Bhd' as the applicant rather than the respondent's name. That application was granted by the court on 10 March 2010.

HIGH COURT DECISION

[8] As rightly pointed out by the learned counsel for the appellant, the learned judge reinstated the bankruptcy notice on four grounds and they are as follows:

(a) the substituted service order is not defective in view of the amendment made on 18 March 2010;

(b) leave to issue the bankruptcy notice was not necessary;

(c) the sum claimed is correct as the appellant failed to challenge it under s 3(2)(ii) of the Bankruptcy Act 1967 ; and

(d) interest claimed is accurate as it was in accordance to the judgment.

OUR GROUNDS OF DECISION:

[9] It is our considered view that this appeal can be dispensed with by deliberating on the validity of the substituted service of the bankruptcy notice and the bankruptcy notice itself.

Bankruptcy notice

[10] It is undisputed that order for extension and substituted service contained the name 'Citibank Bhd' when it was first issued on 21 April 2009. As pointed out earlier, the appellant on 16 December 2009 applied to set aside the bankruptcy notice and substituted service of the same.

[11] In respect of the order for the extension of bankruptcy notice, it was contended that it suffered a fatal defect in that it showed that the claim against the appellant was from 'Citibank Bhd' and not the respondent. The respondent sought to remedy this by an application to amend the extension and substituted service order after they were found out so to speak by the application to set aside.

[12] That application to amend was made after the application to set aside, in fact some three months later. The issue which confronts us is whether the amendment made had remedied the just mentioned defect.

[13] It is our view that when the order for extension of the bankruptcy notice containing the name 'Citibank Bhd' was made, it cannot by any stretch of imagination be a valid extension for the simple reason that 'Citibank Bhd' had no locus to make that application. Further when that bankruptcy notice was served by publication by virtue of the substituted service order, it also cannot be

any service of a bankruptcy notice on the appellant as it suffered from a fatal defect as mentioned above. In short there was no service whatsoever.

[14] The amendment order on 18 March 2010 with respect cannot revive something which never had a life in the first place. This is not a pleading so to speak and thus that amendment cannot relate back. Furthermore at the time of application to set aside was on 16 December 2009, the learned senior assistant registrar can only deal with the facts as at that date and at that date the bankruptcy notice suffered a fatal defect. Hence the learned senior assistant registrar was perfectly correct to set aside the bankruptcy notice.

[15] Another disturbing factor in this appeal is the mode of application for amendment of the bankruptcy notice and substituted service of the same. The respondent had used an ex parte application. At that point in time, the appellant had already filed an application to set aside the bankruptcy notice and we see no reason whatsoever why the appellant or his solicitors was not informed of that application which cannot be treated as an uncontested one. As such the principle of natural justice in our view must be applied with full force in that circumstance.

[16] Accordingly we find that the bankruptcy notice is defective and cannot be used to premise the respondent's bankruptcy action against the appellant.

Substituted service application

[17] Learned counsel for the appellant had also relied on the inconsistent reasons given by the respondent for the ex parte application for substituted service to contend that the application for substituted service is flawed. In the letter of appointment for service, it stated that on two occasions of attempted service, the respondent's representative was told that the appellant was not present at the premises. In the affidavit of the process server, he stated that the premises were closed and his calls were not answered. Learned counsel for the respondent brushed this argument aside by saying they are petty arguments.

[18] With respect we are not able to agree with learned counsel for the simple reason that when any application is made to the courts especially an ex parte basis and in this case counsel was dispensed with attendance, the applicants must make full, frank and accurate disclosure to the court. They are duty bound to do so. The courts expect no less. They cannot rely on grounds which are not consistent. Practice Note No 1 referred to in the case of *Re Aris Massod; Ex P UoL Factoring Sdn Bhd* [1999] 3 MLJ 358; [1998] 4 CLJ Supp 446 by Steve Shim J (as he then was) remains relevant today in respect of any application for substituted service of any cause document. Both practitioners and officers of the court should be mindful of what is stated in the just

mentioned practice direction though made in 1968.

[19] Further it must be remembered that bankruptcy proceedings against anyone is a drastic measure with great and damaging ramifications to one's livelihood. A bankrupt's life in many respect is shackled by many chains and is under the supervision by the official receiver during his bankruptcy life. As such, the courts cannot accept any cavalier approach, a strict approach must be the order of the day.

Sealed order of the judgment

[20] Another reason for our decision is the sealed order which in our view is incomplete and unsatisfactory to say the least. It is trite law that bankruptcy notice must be based on the sealed order of the judgment. In this case, it is undisputed that the sealed order merely states '13% interest' and not '13% interest per annum or month' as is done in all orders. So on the face of that order, the court cannot say that on what basis was interests charged, is it 13% per month or per annum? One must not forget that the primary document to premise a bankruptcy notice is the judgment and when that is not clear, that bankruptcy notice is to say the least suspect. Hence we have no alternative but to hold that the bankruptcy notice did not conform to the terms of the sealed order of the judgment.

CONCLUSION

[21] For reasons stated above, we allowed the appeal with costs of RM5000 to the appellant and ordered that the deposit to be refunded to the appellant. Accordingly the decision of the High Court is set aside and the decision of the learned senior assistant registrar is reinstated.

Appeal allowed with costs of RM5,000.

Reported by Kohila Nesan